

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

THE ESTATE OF LEWIS AVERY)	
ROBERTS, DECEASED, and MARY)	
ELLEN GLASCO, individually and as)	
Parent and Next of kin of Lewis Avery)	
Roberts, Deceased,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. CIV-04-19-M
)	
THE CITY OF OKLAHOMA CITY, et al.,)	
)	
Defendants.)	

ORDER

Before the Court is plaintiffs' Motion to Substitute Expert Witness, filed December 12, 2006. On December 14, 2006, defendants filed their response and objection. Based upon the parties' submissions, the Court makes its determination.

This case is currently set on the Court's March, 2007 trial docket. The discovery deadline was December 15, 2006, and the deadline to file dispositive motions was December 31, 2006.

On October 27, 2004, plaintiffs' medical expert, James L. Fishback, M.D., submitted his written report on the cause of death of Lewis Avery Roberts. Possibly as early as December 5, 2005 or as late as May 24, 2006, counsel for co-defendant Aven Bull first requested Dr. Fishback's deposition. Both of plaintiffs' counsel have made numerous attempts to contact Dr. Fishback but have been unable to contact him. Because they were unable to contact Dr. Fishback, plaintiffs' counsel located and secured a substitute medical expert, Dr. Werner Spitz, for this matter. Plaintiffs now request the withdrawal of Dr. Fishback and the substitution of Dr. Spitz as their medical expert. Defendants object to this request.

Having carefully reviewed the parties' submissions, the Court finds that due to the clear

prejudice to defendants and the untimely nature of plaintiffs' request, plaintiffs' Motion to Substitute Expert Witness should be denied. Even assuming Dr. Fishback's deposition was not requested until May 24, 2006, plaintiffs' counsel should have been aware of their need to find a substitute medical expert by at least July, 2006, should have located a substitute expert by September, 2006, and should have filed the instant motion by at least October, 2006. Additionally, at the time plaintiffs filed their motion, the deadline for discovery was only three (3) days away, and the deadline for filing dispositive motions was less than twenty (20) days away.¹ Finally, the Court would note that plaintiffs' instant motion was filed over one year after the deadline for their final expert witness list.

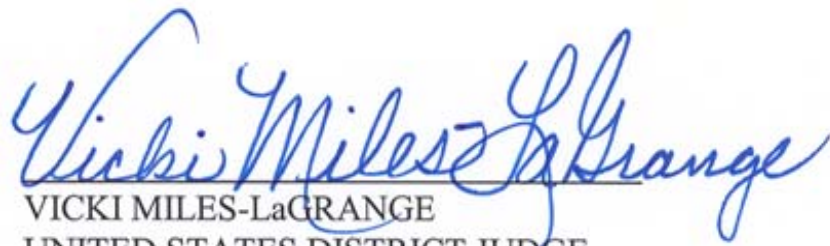
In light of the above deadlines and the fact that this case is on the Court's March, 2007 trial docket, the Court finds that defendants would be greatly prejudiced by allowing the substitution of Dr. Spitz as plaintiffs' medical expert. Defendants would not have adequate time to investigate Dr. Spitz's background or research his findings and any potential inconsistencies that have been previously presented in testimony. Defendants have already submitted their motion for summary judgment and, thus, would not be able to address Dr. Spitz's opinion in that motion. Further, due to the impending deadlines, defendants would not have the option of electing to retain an expert to rebut or counter Dr. Spitz.² Finally, the Court finds that due to the fact that the discovery and dispositive motion deadlines have passed, defendants will be without the ability to cure the prejudice they would suffer if Dr. Spitz was substituted as plaintiffs' medical expert.

¹The Court would note that at the time plaintiffs filed their motion, Dr. Spitz's expert report had not been prepared or delivered to plaintiffs' counsel. In their motion, plaintiffs state that they anticipate to have it within fifteen (15) to twenty (20) days.

²In their response, defendants note that based upon plaintiffs' representation that Dr. Fishback would not be testifying as a witness in this case defendants determined that it would be unnecessary to seek permission to add a medical expert as a defense witness.

Accordingly, for the reasons set forth above, the Court DENIES plaintiffs' Motion to Substitute Expert Witness [docket no. 117].

IT IS SO ORDERED this 25th day of January, 2007.


VICKI MILES-LAGRANGE
UNITED STATES DISTRICT JUDGE